

Surface Transportation Board
Washington, D.C. 20423-0001

Office of Economics

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Office of Proceedings
August 2, 2023
Part of
Public Record

July 27, 2023

Mr. Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Re: Waybill Request WB23-41 & FD 32760 (Sub No. 46)

Dear Mr. Denton:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated July 25, 2023 for permission for continued access to the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with FD 32760, BNSF Railway Company – Terminal Trackage Rights – Kansas City Southern Railway Company and Union Pacific Railroad Company, on behalf of BNSF Railway Company. Specifically, you request that your access to data granted pursuant to WB15-45, WB20-45, and WB21-60 be renewed. WB15-45 granted you access to the 1994-2013 unmasked costed waybill samples for UP, SP, BNSF, ATSF, and KCSR for all terminations and originations in Lake Charles (1995 BEA #86). WB20-45 granted you access to the 2017-2019 unmasked costed waybill samples for all traffic pertaining to UP, KCSR, and BNSF. Also, you were granted access to a limited subset of 2017-2019 data for the entire waybill sample as shown in Attachment A to your letter and the 1996-2016 unmasked costed waybill samples for all terminations and originations in Lake Charles (1995 BEA #86). WB21-60 renewed access for WB15-45 and WB20-45. WB21-60 was later extended in WB22-48. You state the data in your request is needed to prepare verified statements for this proceeding.

Based on the explanations and justifications contained in your request, you will be authorized to access the requested data. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), continued access to the data already in your possession under WB15-45 and WB20-45. These datasets may only be used for purposes of this proceeding. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) *Adrian Steel – Mayer Brown*
- b) *Peter Denton – Steptoe & Johnson*
- c) *Tara Woods – Steptoe & Johnson*
- d) *Michael Baranowski – FTI Consulting*
- e) *Nathan Zebrowski – FTI Consulting*
- f) *Jude Ponnuthurai – FTI Consulting*
- g) *Shane Vyskocil – FTI Consulting*

h) Gareth Bond – FTI Consulting

The expiration date for this agreement is July 31, 2024. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy copies of the data as described in item 7 of the agreement.

Several aspects of the CCWS limit the conclusions that may be drawn from analysis of the CCWS: 1) the CCWS is a sample, and 2) the CCWS is based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads are included in the sample. The limited sampling of small railroads may have a substantial effect on studies covering areas served predominately by non-sampled railroads. For additional information on the CCWS, see *Reference Guide* @ <https://www.stb.gov/reports-data/economic-data/> on the Board's website.

The rules for release of waybill data are codified at 49 C.F.R. § 1244.9. The CCWS contains confidential shipper and railroad data. As a result, the CCWS is commercially sensitive and has the potential to cause competitive harm to shippers and railroads if disclosed. Therefore, the following agreement must be signed, and a copy of the signature pages returned to the STB, before any waybill data can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data released to you solely for purposes of the proceeding identified above. Such purposes include any judicial review arising from that proceeding.
2. Absent permission from the STB, you shall make the information contained in the CCWS (including work product and analyses derived from the CCWS) available only to the individuals identified above. The STB may approve access for additional individuals for purposes of the proceeding. In general, such individuals must be outside counsel in this proceeding, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, review, or handle the CCWS for purposes of the proceeding, including testifying and consulting experts. Each such additional individual must review and sign this agreement and return a copy of the signature page to the STB.
3. Pleadings and evidence filed with the Board in the proceeding may contain CCWS data (including work product and analyses derived from the CCWS). Unless data in the pleadings and evidence are aggregated to the level of at least three shippers and will prevent the identification of an individual railroad, the pleadings and evidence must be filed with the Board under confidential filing procedures (both in e-filing and paper submissions). Such pleadings and evidence

should be appropriately marked to indicate that they contain confidential Waybill data and, if submitted in paper or on physical media, be in a package clearly marked on the outside “Highly Confidential Material: Contains Waybill Data.” Such pleadings will not be posted in the publicly available docket. A public version of the pleading and evidence that redacts unaggregated CCWS data should also be filed for posting in the public docket.

4. Pleadings and evidence (and underlying workpapers) containing CCWS data (including work product and analyses derived from the CCWS) may be disclosed only to outside counsel or other independent representatives for other parties to the proceeding who have signed an agreement with the Board that grants them access to the underlying CCWS data.
5. CCWS data may be disclosed to the reviewing court in briefs filed or oral argument made in connection with judicial review arising from the proceeding, but the party making such disclosure must take adequate steps to maintain the confidentiality of the data by filing pleadings under seal and seeking confidential treatment of the data at oral argument (and in any transcripts). Counsel who wish to access CCWS data for purposes of participating in judicial review arising from the proceeding must have signed an agreement with the Board that grants access to the data, and may be added pursuant to paragraph 2 above.
6. Except as provided in paragraph 4 above, you will refer any requests for CCWS data in your possession (including work product and analyses derived from the CCWS) to the STB for processing and will inform the requesting party of such referral to the STB. If you are compelled by law or order of a governmental or judicial body to release CCWS data, you shall notify the Board in writing within three days of any determination that CCWS data must be released, and in no event later than five days before the CCWS data is scheduled to be released.
7. In order to retain access to the CCWS beyond the expiration date specified above, you must submit a written request for an annual extension of the agreement no later than thirty days prior to the expiration date and the renewal request must be approved by the Office of Economics. **If an annual agreement is not signed and approved, you must certify by no later than the expiration date that all CCWS data (including all work product and analyses derived from the CCWS) obtained under this agreement has been destroyed or returned to the STB.** Notwithstanding the foregoing, outside counsel (but not outside consultants or transportation practitioners) for each party may retain file copies of all pleadings and evidence filed with the Board and file copies of all work product. The non-disclosure requirements of this agreement shall continue to apply to such file copies for as long as they are retained.

Waybill Agreement WB23-41

8. Failure to request an extension (if necessary), or destroy or return CCWS data when required, may prevent any future release of CCWS data to you. Violations of this agreement may subject you to sanctions by the Board.

After all parties have signed and returned this agreement, please contact Mr. Dusenberry (202) 245-0319 to make the necessary arrangements to have a copy of the data sent to you. The STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of **\$120** (\$60 per signature of a new confidentiality agreement- Shane Vyskocil and Gareth Bond) is required. Payment can be made through the Board's electronic payment system, Pay.gov. Your payment through Pay.gov will generate a unique Pay.gov transaction number, which you will need to provide with your signed agreement. Pay.gov accepts payment through bank accounts, credit cards, debit cards with a MasterCard or Visa logo, and digital wallet. Payment can also be made directly to the Board via check or money order.

Sincerely,

Francis X. O'Connor

Francis O'Connor
Acting Director
Office of Economics

Waybill Agreement WB23-41

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Adrian Steel

/s/ Adrian L. Steel, Jr.

Signature

Waybill Agreement WB23-41

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By: Peter Denton

/s/ Peter Denton

Signature

Waybill Agreement WB23-41

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By: Tara Woods

/s/ Tara Woods

Signature

Waybill Agreement WB23-41

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By: Michael Baranowski

/s/ Michael Baranowski

Signature

Waybill Agreement WB23-41

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By: Nathan Zebrowski

/s/ Nathan Zebrowski

Signature

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By: Jude Ponnuthurai

/s/ Jude Ponnuthurai

Signature

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By: Shane Vyskocil

/s/ Shane Vyskocil

Signature

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Gareth Bond

/s/ Gareth Bond

Signature

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

July 25, 2023

Via Email

Director Francis O'Connor
Office of Economics
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: **Finance Docket No. 32760 (Sub-No. 46)**
BNSF Railway Company – Terminal Trackage Rights – Kansas City
Southern Railway Company and Union Pacific Railroad Company
Waybill Data Access WB20-45 and WB15-45 Annual Extension
Request and Request to Include Additional Consultant

Dear Director O'Connor:

Pursuant to 49 C.F.R. § 1244.9(b)(4), Steptoe & Johnson LLP (“Steptoe”), along with Mayer Brown LLP (“Mayer Brown”), both of which are outside counsel for BNSF Railway Company (“BNSF”) in the above-referenced proceeding, respectfully request an extension of its access to the confidential Carload Waybill Sample (“CCWS”) data under WB21-60, WB20-45, and WB15-45.

The WB21-60 Agreement provides continued access to the data in WB20-45 and WB15-45. WB20-45 consists of (1) the 100% carload waybill data for Union Pacific Railroad Company (“UP”), The Kansas City Southern Railway Company (“KCSR”), and BNSF for 2014-2019, (2) the limited subset of data for the entire waybill sample as shown in Attachment A for 2017-2019, and (3) the 1996-2016 unmasked costed waybill samples for all terminations and originations in Lake Charles (1995 BEA #86). BNSF also respectfully requests an extension of WB15-45, granting approval of BNSF’s request to access certain carload waybill data for UP, Southern Pacific (“SP”), Atchison, Topeka and Santa Fe Railway (“ATSF”), and KCSR for the years 1994-2013. No additional data is being requested at this time.

Renewed access to WB20-45 and WB15-45 was previously approved until August 31, 2023 pursuant to the enclosed STB Waybill Agreement W21-60 letter dated August 10, 2022 (Attachment B). BNSF's counsel and consultants are thus timely requesting an extension of access to this data.

The purpose of this request is to allow BNSF's counsel and its consultants to evaluate relevant issues as the proceeding is still pending. Access to the above-described CCWS data is the only practicable way for BNSF's counsel and consultants to evaluate certain issues relevant to this proceeding. Obtaining traffic data from other sources would be burdensome, costly, and impractical.

Continuation of access is being requested for the following outside counsel and consultants (please note these individuals were also listed in the August 10, 2022 STB authorization letter):

Adrian Steel (Mayer Brown)
Peter Denton (Steptoe)
Tara Woods (Steptoe)
Michael Baranowski (FTI Consulting)
Nathan Zebrowski (FTI Consulting)
Jude Ponnuthurai (FTI Consulting)

At this time, we also request that the following consultants be added:

Shane Vyskocil (FTI Consulting)
Gareth Bond (FTI Consulting)

Once we receive confirmation from your office of the amount owed under 49 C.F.R. § 1002.2(f)(98) for this request, we will submit payment through Pay.gov.

If additional outside counsel or consultants are retained, we will amend our request to add such individuals. Any reports generated by outside counsel or consultants will not be disclosed to any party unless aggregated to at least the three FSAC rule in accordance with 49 C.F.R. § 1244.9(f).

We understand the limitations of the CCWS files regarding revenues and accuracy. We also understand that the data includes confidential shipper and carrier information. We will treat this data as highly confidential, and we will make the data available only to certain of our attorneys and members of our staff in accordance with 49 C.F.R. § 1244.9(b)(4). Any Waybill data disclosed to any other

Director Francis O'Connor
July 25, 2023
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Steptoe

party not specifically covered herein, however, will be aggregated to the three FSAC rule according to 49 C.F.R. § 1244.9(f).

We will undertake all efforts to ensure that all those with access to the Waybill data will comply with the confidentiality requirements established in the regulations. We understand that we may be required to sign an agreement before continuing to utilize the requested CCWS data. We will comply with the Board's confidentiality requirements, and no person, other than those listed here, will be entitled to access and review the raw data contained within the Waybill sample.

Your prompt attention to this request is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton

Enclosures

cc: Adrian L. Steel, Jr., Mayer Brown LLP